IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 425 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SAPNA ENTERPRISE

Versus

KRUSHNA TALKIES

Appearance:

1. Appeal from Order No. 425 of 2002

M/S THAKKAR ASSOC. for Appellant

MR PARTHIV B SHAH for Respondent Nos. 1-5

..... for Respondent Nos. 6-9,11

MR SN SHELAT WITH MS SHRUTI D TRIVEDI for Respondent No. 10

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 26/04/2004

ORAL JUDGEMENT

1. This Appeal from Order is filed by the appellant - original plaintiff against the order dated 19.09.02

passed by the 2nd Joint Civil Judge (S.D.), Vadodara below an application Ex.5 in Special Civil Suit No.889/99, whereby the learned trial Judge has rejected the injunction application and the order of status-quo granted earlier on 29.09.99 was vacated.

2. The brief facts of the present Appeal from Order are that :-

2.1 The present appellant - original plaintiff has entered into an agreement to sell on 02.12.92 with the respondent No.1, which is a partnership firm and the said agreement was signed by the appellant as well as the respondent Nos.2 to 5, who are the partners of the said partnership firm. However, the said agreement was not signed by the respondent Nos.6 to 11, who are also the partners of the said partnership firm. It is the case of the appellant that at the time of execution of the agreement to sell, Rs.1,25,000/-- were paid as an earnest money. The said payment was made by the appellant by A/c. Payee cheque to the respondent Nos.1 to 5 and it was credited in the account of the partnership firm.

2.2 Subsequently, the said agreement to sell executed between the appellant and respondent No.1 - Firm was disputed by the respondent Nos. 6 to 11 who are the partners of the partnership firm and they have filed Civil Suit before the Court of learned Civil Judge (S.D.), Vadodara being Special Civil Suit No.294/93 for dissolution of the partnership. In that suit, the Court Commissioner was appointed and injunction was granted by the trial Court. It has also come on record, that the agreement to sell dated 2nd December, 1992, came to be extended upto 1996.

2.3 Certain cheques were given by the appellant to the respondents No.1 to 5, however, the said cheques were not deposited by the said respondents and they have not encashed the said cheques. It is also the case of the appellant that in Special Civil Suit No.294/93, written statement was filed by the respondent Nos.1 to 5 wherein it was specifically stated that consent was given by respondent No.6 to 11 and the fact regarding the execution of the agreement, was well within their knowledge.

3. On the basis of the aforesaid facts, Mr.P.M.Thakkar, learned senior advocate for the appellant has submitted that the appellant was protected all through out during the pendency of the injunction application and even after disposal of the said

application, this Court has directed to maintain status-quo. He has submitted that one group of partners in term admitted that they have executed the agreement to sell and possession was handed over. He has further submitted that even in Special Civil Suit No.294/93, an inquiry report was obtained and the reference regarding the appellant's board on the suit premises was found. He has further submitted that the appellant - original plaintiff has proved the prima facie case and balance of convenience before the trial Court. If the respondents are not restrained from creating any third party rights or not directed to maintain status quo, an irreparable injury would be caused to the appellant. He has, therefore, submitted that there is no reason for not directing the parties to maintain status-quo during the pendency of the suit. It is further submitted that the issues raised in the present proceeding as well as in Special Civil Suit No.294/93, can be decided by the trial Court at the time of final disposal of the suit and if the order of status-quo is not passed during the pendency of the suit, the whole suit will be frustrated and even if the appellant succeeds in the suit and decree is passed in its favour, it would remain merely a paper decree.

4. In support of his contention, Mr.Thakkar has relied on the decision of the Hon'ble Supreme Court in the case of ASHWINKUMAR K. PATEL Vs. UPENDRA J. PATEL, reported in 1999 (1) G.L.H. 1052. The Hon'ble Supreme Court has observed that though the agreement of sale executed in favour of the plaintiff was, according to said Court, invalid because of its being in breach of the Tenancy Act, still in view of the compromise decree and the subsequent admission, and the report of the Court Commissioner and the trial Court's finding with regard to permissive possession, the prima facie case was made out. The Hon'ble Supreme Court has held that a possessory right was sufficient to permit the plaintiff to have an order of temporary injunction in his favour.

5. On the basis of the above judgment, Mr.Thakkar has submitted that in the present case even if it is assumed that there was the breach of Partnership Act, since one group of partners has admitted the execution and the Commissioner's report indicates the possession of the appellant, the order of status quo enjoyed by the appellant till this date is required to be continued during the pendency of the suit.

6. Mr.Parthiv B. Shah, learned advocate for the respondent Nos.1 to 5 has submitted that the agreement to

sell was executed by the firm. He has adopted the agreements canvassed by Mr.Thakkar and submitted that the order of status-quo would be continued till the final disposal of the suit.

7. Mr.S.N.Shelat, learned senior advocate appearing for the respondent No.10 has submitted that the agreement to sell dated 02.12.92 was not signed by the respondents No.6 to 11 and the said agreement was contrary to the provisions of the Partnership Act and was illegal and void. He has further submitted that no express authority was granted nor it can be inferred by implication in absence of any usage or trade of custom. Section 19(2)(g) of the Act puts such restriction on the partner. In support of his submission, he has relied upon the decision of the Hon'ble Supreme Court in the case of JAGDISH CHANDRA VIJHAWAN Vs. S.K. SARAF, reported in AIR 1999 S.C. 2171, wherein the Hon'ble Supreme Court has held in para-46 that under Section 19(1) of the Partnership Act, the acts of a partner which are done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm. Under Section 19(2) in the absence of any usage or custom of trade to the contrary, the implied authority (here express authority under Clause 10 of the same nature) does not prima facie empower the partner to "transfer immovable property belonging to the firm" as stated in clause (g) of Section 19(1) of the Partnership Act. Mr.Shelat has submitted that here in this case, the respondents No.6 to 11 have not given any consent to respondents No.2 to 5 to transfer the immovable property as per the agreement to sell. In absence of any express authority or consent the entire action of execution of an agreement to sell is illegal and the said agreement cannot be enforced against the respondents No.6 to 11.

8. Mr.Shelat has further relied upon the decision in the case of RAJNIKANT HASMUKHBHAI GOLWALA AND OTHERS Vs. NATRAJ THEATRE, reported in AIR 2000 (Gujarat) 80, wherein it is held that no partner can sell any part of the assets of the partnership firm as belonging to him and this being the position no partner can ever validly sell or dispose of any of the partnership property vests in the firm and it does not vest in any of the partners and, therefore, it would not be possible for any partner to pinpoint any portion of the partnership property as his own property.

9. After having heard the learned advocates for respective parties and after having gone through the order passed by the trial Court as well as after having

perused the documents produced before this Court, the Court is of the view that the trial Court has rightly rejected the injunction application. The agreement to sell was executed on 02.12.92 and the suit for dissolution was filed before the trial Court in the month of April 1993. The said agreement to sell was executed by one group of partners. Admittedly, the said agreement was not signed by the other group, which has specifically denied of giving any consent. On the contrary, the suit for dissolution was pending. Even otherwise, the agreement to sell speaks about the earnest money of Rs.1,25,000/- as against the property allegedly agreed to be sold at Rs.49,99,999/-. From 1992 to 1999, nothing had happened with regard to the suit property. In the suit for dissolution filed by respondent No.10, the trial Court has passed the order with regard to appointment of Court Receiver and the suit property was in-charge of the receiver. The defendants in that suit are restrained from disposing of the movable property. In light of this fact, it is difficult to believe that the present appellant is in possession of the suit property. Even otherwise, Section 19(2)(g) of the Partnership Act makes it abundantly clear that in absence of any usage or custom of trade, the implied authority of a partner does not empower him to transfer immovable property belonging to the firm. Mr.Shelat has referred to the decision of the Hon'ble Supreme Court as well as of this Court in support of his submissions that the respondents No.1 to 5 are not entitled to execute the agreement to sell in favour of the appellant and since the said agreement per se is illegal, it cannot be enforced in the Court of law.

10. Taking over all view of the matter and considering the nature of the dispute between the parties and also after taking into consideration, the three celebrated principles of granting interim injunction, i.e. prima facie case, balance of convenience and irreparable injury, this Court is of the view that the appellant is not entitled to the order of status-quo as prayed for in this Appeal from Order.

11. It is needless to state that the above observations made by this Court as well as the observations made by the trial Court in its impugned order are prima facie observations and while disposing the suit finally, the Court may not be influenced by the said observations. Since, the earlier suit between the parties is of 1993 and the present suit is of 1998, this Court is of the view that in the interest of justice, both the suits are directed to be decided and disposed of as expeditiously as possible.

12. With the aforesaid observations and directions, this Appeal from Order is dismissed accordingly. The order of status-quo granted by this Court in Civil Application stands vacated.

In view of the order passed in Appeal from Order, Civil Application No.7494 of 2002 does not survive and the same is, accordingly, disposed of.

[K. A. Puj,J.]

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